

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

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| UNITED STATES OF AMERICA, |) | CASE NO. 5:09-CV-00272 |
| |) | |
| Plaintiff, |) | JUDGE JOHN R. ADAMS |
| |) | |
| vs. |) | |
| |) | |
| CITY OF AKRON, OHIO, |) | <u>DEFENDANT CITY OF AKRON'S</u> |
| |) | <u>STATUS REPORT</u> |
| |) | |
| and |) | |
| |) | |
| THE STATE OF OHIO, |) | |
| |) | |
| Defendants. |) | |

Pursuant to this Court's Order of April 22, 2019 (Dkt. No. 200), and without waiving any rights, privileges or objections, the City of Akron ("Akron") respectfully submits this Status Report. This Status Report includes a discussion of the overall framework of the Consent Decree that was entered by the Court on January 17, 2014 (the "Consent Decree") (Dkt. No. 154), a discussion of Akron's compliance with the Consent Decree, followed by Akron's responses to the specific items that are set forth in the Court's April 22, 2019 Order.

The Consent Decree includes a specific framework that was negotiated by the Parties for developing and implementing control measures. The Parties included flexibility into the Consent Decree to allow for certain changes to those controls without Court approval. The Consent Decree also includes a framework for the oversight and enforcement by the United States of America ("United States") and the State of Ohio ("Ohio") of Akron's implementation of the control measures.

Since prior to the entry of the Consent Decree, Akron has been diligently completing the projects. To date, Akron has expended over \$650 Million in capital costs for the design and construction of the completed projects and the projects currently under construction. 65% of the

projects required under the Consent Decree have been completed, and an additional 27% have been started and are currently being implemented. Akron will continue to expend considerable resources to comply with the Consent Decree. In addition to working collaboratively with the Environmental Protection Agencies of the United States and Ohio (respectively, the “U.S. EPA” and the “Ohio EPA”), Akron has also complied with the reporting requirements of the Consent Decree, providing regular reporting and prompt notice of any delays to U.S. EPA and Ohio EPA.

I. THE FRAMEWORK OF THE CONSENT DECREE

The Consent Decree was entered into by the United States, Ohio, and Akron (collectively referred to as the “Parties”) as a mechanism to resolve their dispute¹ and to forego the uncertainties of expensive, protracted, and complicated litigation.² Accordingly, the Parties negotiated and agreed to a specific framework for the development of plans and control measures, and for the implementation, oversight and enforcement of the Consent Decree requirements.³

¹ Page 3 of the Consent Decree provides: “WHEREAS, the United States, the State and Akron recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid prolonged, complicated and expensive litigation among the Parties, and that this Consent Decree is fair, reasonable and in the public interest.”

² The Court’s expert recognized that one of the main strengths of the Consent Decree is that it avoids a contested litigation that would involve viable defenses to the alleged violations. *See* Expert Witness Report of Prof. Craig N. Johnson, pages 2-5. (Dkt No. 153-1).

³ While a consent decree is a court order, courts have held that for purposes of interpretation, a consent decree is also a contract. “The Supreme Court has noted that ‘consent decrees bear some of the earmarks of judgments entered after litigation’ and that ‘[a]t the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts.’” *Shy v. Navistar International Corporation*, 701 F.3d 523, 530, (6th Cir. 2012) (citing *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519, 106 S.Ct. 3063, 92 L.Ed.2d 408 (1986)). “[T]he interpretation of the consent decree as written should focus only within the four corners of the consent decree.” *Id.* *See also U.S. v. Alshabkhoun*, 277 F.3d 930, 934 (7th Cir.2002) (referencing *U.S. v. Witco Corp.*, 76 F.Supp.2d 519, 525 (D.Del.1999)) (interpreting stipulated penalty provisions of a consent decree resolving claims under the federal Clean Water Act).

A. The Development Of Plans Under The Consent Decree And The Inclusion Of Flexibility For Future Changes To Control Measure.

The Consent Decree required Akron to develop specific plans and other documents. *See* Table 1 on page 18 of the Consent Decree. In many cases, those plans and documents were subject to the review and approval of the United States and Ohio. The Parties negotiated specific review and approval procedures, which are set forth in Section XVII of the Consent Decree. In accordance with the Consent Decree, Akron developed these plans and documents, and to the extent required, requested the approval of U.S. EPA and Ohio EPA. One of the most important plans required under the Consent Decree is the LTCP Update, which identifies the majority of the control measures to address the combined sewer overflows (“CSOs”) within Akron’s combined sewer system and to address the secondary treatment bypasses from Akron’s wastewater treatment plant. (The wastewater treatment plant is referred to in the Consent Decree as the Water Pollution Control Station (the “WPCS”). The U.S. EPA and Ohio EPA each approved the LTCP Update after extensive negotiations with Akron.⁴

Recognizing that there would be a need to make future changes to some control measures, the Parties built in a level of flexibility into the Consent Decree and the LTCP Update by including specific procedural mechanisms to allow for limited changes without Court approval. While the LTCP Update included specific controls for upgrading the WPCS’s secondary treatment capacity, Exhibit 2 of the LTCP Update provided Akron with the flexibility to change the sizes of those control measures. In addition, Section V of Consent Decree Attachment A required Akron to perform a subsequent evaluation of the WPCS control measures and if applicable, recommend changes to the technology used for the control measures. Both of

⁴ The U.S. EPA approved the LTCP Update on November 16, 2011. The Ohio EPA approved the LTCP Update on April 11, 2012. The LTCP Update was reviewed by the Court and the Court’s expert prior to the Court’s entry of the Consent Decree.

these provisions allow Akron to make the changes based upon U.S. EPA and Ohio EPA approval. In addition, Exhibit 3 of the LTCP Update allows Akron to propose reductions in the storage volumes of the basins and the tunnels required in the LTCP Update through the use of green infrastructure in combination with other control measures. Similar to the procedures for making changes to the WPCS control measures, Exhibit 3 of the LTCP Update allows Akron to implement its green infrastructure proposal based upon U.S. EPA approval. Finally, the Consent Decree recognizes that events could occur that are beyond the control of Akron and that delay or prevent Akron's compliance with the requirements of the Consent Decree. Therefore, the Parties included the force majeure provisions in Sections XII and XIII of the Consent Decree.

B. The Implementation Of, Oversight, And Enforcement Over The Control Measures.

The general oversight responsibility under the Consent Decree has been placed into the hands of the United States and Ohio. As such, the Consent Decree requires reporting directly to the United States and Ohio, and does not require the Parties to report compliance to the Court. To ensure the efficient use of judicial resources, the Consent Decree contemplates court involvement when necessary to resolve disputes between the Parties. *See* Section XIV.

Sections V and VI requires Akron to implement the CSO and WPCS control measures. Akron documents its compliance with the implementation of the control measures through the reporting requirements under the Consent Decree. Section XV of the Consent Decree requires Akron to prepare semi-annual reports to the United States and Ohio. Section XV includes a detailed format for the semi-annual reports. In addition, Paragraph 83 of the Consent Decree requires Akron to notify the United States and Ohio if Akron violates or has reason to believe that it may violate a deadline for a requirement in the Consent Decree. These reports allow the United States and Ohio to track Akron's compliance and perform their oversight responsibilities.

In addition to their respective oversight responsibilities under the Consent Decree, the United States and Ohio have the authority to implement enforcement measures in the event that Akron fails to comply with the requirements of the Consent Decree, including the authority to demand stipulated penalties under Section XI.⁵ While the Consent Decree provides the United States and Ohio with the right to obtain stipulated penalties, they are not required to seek stipulated penalties. Paragraph 49 provides that stipulated penalties are due and owing upon demand by the United States and/or Ohio but may also be waived by both entities. Under Paragraph 49, a decision by the United States and/or Ohio to waive stipulated penalties is not subject to judicial review.

II. AKRON'S COMPLIANCE WITH THE CONSENT DECREE

A. The CSO And WPCS Controls.

1. The Majority Of The CSO And WPCS Control Measures Have Been Constructed Or Are Under Construction.

Akron has expended considerable resources and has diligently implemented the requirements of the Consent Decree. The CSO and WPCS control measures required under the Consent Decree are identified in Consent Decree Sections V and VI, which includes all of the control measures required under the LTCP Update. In addition, Section VIII of the Consent Decree requires upgrades to the Mud Run Pump Station. To date, Akron has completed the following projects:

- Five sewer separation projects;
- Two green sewer separation projects (i.e. sewer separation with green infrastructure on the storm water component);

⁵ Placing the Consent Decree oversight and enforcement responsibilities with the United States and Ohio, and providing those Parties with the discretion over enforcement, is consistent with duties of the governmental agencies that are involved in this case. The United States and Ohio entered into the Consent Decree on behalf of the U.S. EPA and the Ohio EPA, respectively. These are the regulatory agencies with the primary responsibility for oversight and enforcement of the water pollution laws that are at the heart of this case.

- Four storage basins;
- Rehabilitation and capping on the Main Outfall Interceptor (“MOI”);
- Mud Run Pump Station upgrades; and
- WPCS upgrades that expanded the secondary treatment capacity from 110 million gallons per day (“MGD”) to 220 MGD.

In addition to these completed projects, Akron is currently in the process of constructing the Ohio Canal Interceptor Tunnel (“OCIT”) project, the Rack 27/29 project, the Rack 10/11 storage basin and additional upgrades at the WPCS.

To date, Akron has incurred over \$650 Million in capital costs for the design and construction of the completed projects and the projects currently under construction. Akron currently estimates that it will incur over \$400 Million of additional costs to complete the projects that are currently under construction and the remaining projects in the LTCP Update. The total costs for all of the projects, which exceeds \$1 Billion, does not include costs for operation and maintenance, other annual costs or financing costs. Moreover, the above amount does not include the costs that Akron has incurred, and will continue to incur, to implement the Capacity, Management, Operations and Maintenance (CMOM), Grease Control and Emergency Response Programs. These costs have been and will continue to be paid by the ratepayers of the Akron system.

2. Changes Made To LTCP Update Projects And Compliance With Applicable Deadlines.

Exhibit I of this Status Report is a table that identifies all of the projects that are required under Consent Decree Sections V, VI and VIII, including the LTCP Update.⁶ Exhibit I

⁶ Table 1 on page 18 of the Consent Decree list several plans that Akron was required to prepare and submit to U.S. EPA and Ohio EPA. As documented in Akron’s semi-annual reports, Akron prepared and submitted the plans within

identifies the Consent Decree deadlines, and if applicable, the date that Akron bid the project and the date the project met achievement of full operation (“AFO”). Exhibit I also includes capital costs for the completed projects and for the projects under construction.

Since the approval of the LTCP Update, changes have been made to some of the control measures. These changes are identified Exhibit I, and discussed below.

a. The Rack 5/7 And Rack 36 Projects.

The descriptions for the Rack 5/7 and Rack 36 projects changed from storage basins to green separation projects. The new green infrastructure projects were approved by U.S. EPA and Ohio EPA in accordance with Exhibit 3 of the LTCP Update. Exhibit 3 to the LTCP Update allows Akron to change the size of, or need for, a storage basin with the use of green infrastructure controls. Exhibit 3 of the LTCP Update allows Akron to propose the use of green infrastructure in combination with other controls to reduce the size of a storage basin or tunnel identified in the LTCP Update. In the case of Rack 5/7 and Rack 36, Akron’s proposal included separation projects with green infrastructure controls. The changes to the control measures became effective under Exhibit 3 of the LTCP Update once U.S. EPA and Ohio EPA approved of Akron’s proposals.

b. The MOI Project, Reordering WPCS Projects, And Changes To The WPCS Flowrates.

The project description for the MOI project, and the deadlines for completing upgrades at the WPCS also changed. These changes are consistent with the approved First Amendment to Consent Decree. Exhibit I also shows a change to the required flow rate for the two WPCS projects. (See Rows 17 and 18). The change is based upon U.S. EPA’s approval of Akron’s

the applicable deadlines. In addition, Akron paid the \$500,000.00 in Civil Penalties (Consent Decree Section X) and the required \$900,000.00 payment towards the removal of the Route 82 dam (Consent Decree Section XI).

Alternative Plan for Sizing WPCS Control Measures. This plan was prepared by Akron and submitted to U.S. EPA in accordance with Exhibit 2 of the LTCP Update. The total flow rate of these two projects required an expansion of the wet weather capacity at the WPCS to 280 MGD. Exhibit 2 to the LTCP Update provided Akron with some flexibility as to the sizing of these two projects.

c. Improvements To The Mud Run Pump Station.

Akron experienced two separate force majeure events regarding this project. Paragraph 25 required Akron to complete the improvements no later than October 15, 2015 based upon the approved remedial report. However, there was a delay in obtaining U.S. EPA's and Ohio EPA's approval of the remedial report. Akron notified the United States and Ohio about the force majeure event on February 3, 2014. The remedial report was approved by U.S. EPA on February 26, 2014. The Parties engaged in discussions regarding the length of the delay and steps to mitigate the delay. On October 31, 2014, U.S. EPA issued a letter confirming U.S. EPA's concurrence that the delay was the result of a force majeure event, and extending the AFO date to January 8, 2016 in accordance with Paragraph 58 of the Consent Decree.

On November 25, 2015, Akron notified United States and Ohio of a second force majeure event involving the Mud Run Pump Station. The factory that was supposed to manufacture certain gates for the pump station closed. The manufacturer was able to move the work to another facility, but there was going to be a delay in the delivery of the gates. Akron sent a follow up report on December 7, 2015 explaining that Akron's contractor would be able to operate the station with temporary equipment. The United States provided Akron with a letter on January 28, 2016 stating that the United States agreed that the delay in meeting the AFO

deadline was attributed to a force majeure event. There were no overflows from the pump station during the timeframe of this extension of the AFO deadline.

d. The Rack 15 Storage Basin.

Akron provided the United States with a notification letter on February 3, 2014, and a follow up report on April 18, 2014 notifying the United States and Ohio about a delay to the bid date. In the April 18, 2014 report, Akron advised the United States and Ohio that Akron intended to meet the AFO date.

Akron sent the United States and Ohio a second notification on September 4, 2015 advising that the storage basin would be in operation by the AFO deadline. Akron's notification also explained that there would be a delay in installing certain components of the storage basin. Since these components technically fell under the definition of AFO, there would be a technical delay to the deadline even though the basin would be operational. Akron provided the United States and Ohio with follow up documentation regarding the ability to operate the storage basin during the interim period. The United States sent a letter on January 17, 2016 informing Akron that the United States would not take enforcement for the delay if there were no overflows from the basin in the interim period. Akron sent the United States a letter on February 18, 2018 confirming that the remaining aspects of AFO had been met, and that there were no overflows from the basin during the interim period.

Exhibit I of this Status Report also identifies the changes in the proposed Amendment to Consent Decree and shows a delay to the AFO deadline for the OCIT project. Those projects are discussed in Section III below.

B. Akron's Implementation Of The CMOM Program.

Section VII of the Consent Decree requires Akron to implement a CMOM Program, a Grease Program, and an Emergency Response Plan. Akron timely submitted the required plans to U.S. EPA and obtained plan approvals.

One of the main components of the CMOM Program involves the inspection and cleaning of the sewer system. Every five years, each pipe within the system is inspected, and to the extent needed, the inspected section is also cleaned. Due to localized conditions, Akron inspects and cleans some sewers within the system on a more frequent basis. In addition, every five years every manhole in the system is also inspected. To put this monumental inspection and cleaning program into perspective, Akron's sewer system has over 841 miles of sewer pipes and over 19,027 manholes. Between 2010 and 2018 Akron spent over \$92 Million to implement the CMOM Program.⁷

Section 2.D.(ii) of Akron's approved CMOM Program plan provides that "[t]he goal of both the Consent Decree and the CMOM Program is to reduce and minimize the number of overflows." Akron documents its implementation of the CMOM Program, and this documentation is included within the semi-annual reports that Akron submits to U.S. EPA and Ohio EPA.⁸ Attachment C of the Consent Decree includes detailed requirements for reporting such releases. Attachment C contains a statement that sanitary sewer overflows ("SSOs") and Combined Sewer System ("CSS") releases are prohibited. However, as indicated above, there is

⁷ Defects that are identified during the inspection are scored in accordance with industry standards. Response measures and priorities are determined based upon the type of defect identified during the inspection.

⁸ On October 31, 2014, U.S. EPA granted a request from Akron to modify the CMOM Program. As a result of this approval, specified sewer segments and manholes were removed from the CMOM Program and Akron was provided with additional time to complete the inspection and cleaning of specified sewer segments that were not accessible. On December 7, 2015, the City submitted a written force majeure notification regarding two of these sewer segments and 1 manhole. Due to previously unknown conditions, the City was further prevented from inspecting these sewer assets.

a clear acknowledgement in Consent Decree and the approved plan that releases from Akron's sewer system will occur from time to time, and the goal is to reduce and minimize the number of such releases.

There are times when releases from within the sewer system occur even though Akron has been properly maintaining the sewer system and is fully implementing its CMOM Program. Akron responds to and addresses all such sewer system releases whenever such releases occur. Akron's crews are available 24 hours a day, 365 days a year to respond to such releases. Consistent with the requirements of Akron's approved CMOM Program and Akron's NPDES Permit, these releases and Akron's response actions are reported to Ohio EPA and U.S. EPA.

The release can be group into two categories. The first are releases that are due to the typical types of blockages (e.g., grease, roots, rags, etc.). The second are releases that are not from the typical types of blockages (e.g., vandalism, a water main break, and extreme weather events). Akron submits that the releases, whether caused by blockages due to rags, grease etc., or caused by vandalism, severe weather, etc., are due to events that are beyond Akron's control and, therefore, are force majeure events under the Consent Decree.

III. THE NINE ITEMS IN THE COURT'S ORDER

The Court's Order listed nine items, which are restated below with Akron's response. Akron incorporates by reference Sections I and II of this Status Report into the following responses.⁹

⁹ The Items in the Order could arguably be interpreted to include communications and/or records covered by the Attorney-Client or Work Product Privileges, or settlement communications under Evid. Rule 408. By submitting this Status Report Akron does not waive any rights, objections, and/or privileges, nor does Akron waive any objections to the admissibility of evidence.

A. Item #1: When Akron Learned That It Would Not Meet The Tunnel Completion Deadline.

The AFO deadline for the OCIT is December 31, 2018. (*See* Row 11 of the LTCP Update.) On September 14, 2017 Akron received a letter from Parsons (Akron's Construction Manager) to Kenny/Obayashi, the OCIT contractor. (the "Contractor"). This letter refers to a recovery schedule that was submitted to Parson's on September 13, 2017. This recovery schedule identified the scheduled date for meeting AFO as being fourteen days behind the AFO deadline. This is the first time that Akron was provided official notification showing that the OCIT project would be delayed beyond the AFO deadline. At that point in time, the delay was attributable to a delay in the construction of the tunnel boring machine ("TBM"). While this new schedule only identified a 14-day delay in the AFO deadline, the TBM was delivered to the construction site 9 months behind schedule. The delay in delivery of the TBM used up all of the available "float" or cushion within the overall OCIT project schedule.¹⁰

Prior to the receipt of the September 13, 2017 recovery schedule, the Contractor had informal discussions with Akron and its Construction Manager about significant delays in the construction of the TBM. The Contractor, however, had been taking steps to prevent the delay from affecting the schedule, such as rearranging the order of future work activities. It was only on September 13, 2017, that the Contractor notified Akron that it believed further corrective measures to make up for the delay were not available.

B. Item #2: When Akron Informed The United States And State Of Ohio That It Would Not Meet The Deadline.

On September 21, 2017 Akron provided written notification to the United States and Ohio in accordance with the Consent Decree. Akron's notification letter included a copy of the

¹⁰ From conversations with the Contractor, Akron is aware that the Contractor's schedule included four months of "float," essentially extra time to account for potential setbacks and delays in the construction process.

September 14, 2017 letter referred to in the prior response. This letter is the official notification under the Consent Decree. Counsel for Akron verbally communicated with counsel for the United States and Ohio in advance of the submission of this notification.

The Parties participated in conference calls on September 6, 2017 and September 14, 2017, which was prior to the submission of the notification letter. Akron believes that during both of these calls Akron informed the United States and Ohio about the significant delay in the manufacture and deliver of the TBM, and that there could be a resulting delay to the OCIT AFO deadline.

It is important to note that while Akron's notification letter refers to a projected delay of fourteen days to the AFO deadline, Akron also advised the United States and Ohio that the delays in the manufacturing and deliver of the TBM used up the available cushion in the overall project schedule and that as a result, the actual, final delay in meeting the AFO deadline, if any, would not be known until much later in the construction process. At that point in time, however, there was still a possibility that the Contractor could make up the 14-day delay during the remaining portions of the construction process. At the same time, it was also possible that given the complexities of the mining operation and the other OCIT construction activities, and the loss of the cushion within the project schedule, there could be longer delays to the AFO deadline.

Akron submitted a follow up notification on October 17, 2017, and the Parties had a conference call in December 2018. The Parties agreed that on a going forward basis, Akron would provide the United States and Ohio with the monthly updates to the schedule that were prepared by Akron's Construction Manager.

C. Item #3: Details Surrounding The Parties' Discussions Over Supplemental Projects That Would Be Designed To Alleviate Some Portion Of The Harm Caused By The Delay In Completion Of The Tunnel, Including The Cost And Completion Date Of Those Projects.

The Parties have had informal discussions regarding potential mitigation for the delay in meeting the OCIT AFO deadline. On November 29, 2018, Akron provided the United States and Ohio with a table listing projects that Akron completed ahead of the applicable deadlines. The table also identified the number of days that the WPCS treated flows were above the CSO required flowrate of 130 MGD. Finally, the table identified two projects that were not required by the Consent Decree; restoration work on Camp Brook, and Akron's Residential Rain Barrel and Tree Program.

Akron recently performed an up to date calculation of the volume of overflows that have been treated at the WPCS above 130 MGD flow rate required by the Consent Decree. Specifically, Akron has treated over 863 million gallons of additional flow that Akron was not required to treat under the Consent Decree. This significant mitigating factor, along with the details of how the volume was calculated was recently provided to the United States and Ohio.

In addition to the foregoing, on April 23, 2019, Akron provided the United States and Ohio with details of a proposed restoration project within the Little Cuyahoga River. Akron believes that the project, if implemented, would provide water quality benefits, including improvements to stream habitat and biological conditions, and stabilization of banks. These are additional water quality benefits that will not be obtained through the implementation of the Consent Decree. The current estimate for the project is approximately \$1.7 Million. The benefits from the early completion of projects and from the stream restoration project should offset any delay to meeting AFO for the OCIT project.

D. Item #4: Any Identifiable Environmental Effects Of The Delay Including Any Overflow Events That Have Occurred After The December 31, 2018 Deadline.

The NPDES Permit for the WPCS includes monitoring requirements for the CSOs. This monitoring data is reported to Ohio EPA on a monthly basis. Data has been gathered and reported to Ohio EPA through the end of March 2019. During this timeframe the data gathered and reported includes overflow events and volumes that occurred from the Racks that will be controlled by the OCIT.¹¹ There have been overflow events during this timeframe. The reports also include instream data gathered under the NPDES Permit.¹² Based upon a review of this data, Akron does not believe that these overflows caused or contributed to a water quality standard violation for the parameters monitored during this timeframe.

E. Item #5: Whether The Performance Criteria For The Tunnel – “No More Than 7 CSOs --Racks 4 And 37: 0 CSOs” – Has Been Met In 2019.

Since January 1, 2019, there have been overflows from Racks that will be controlled by the OCIT. (*See* Section D, above). If the tunnel was in operation during this timeframe, at least some and possibly all of the overflow volume would have been controlled by the OCIT.

The performance criteria in the LTCP Update, however, is based upon the Typical Year, as that term is defined in the Consent Decree. A performance criteria analysis would involve recalibrating the model using the procedures in Akron’s Post Construction Monitoring Plan. This is an exercise that is done after the projects have been constructed and in operation.

¹¹ The monitor for Rack 19 was not in operation due to construction interruptions.

¹²Per the terms of the NPDES Permit, Akron did not collect instream samples for overflow occurrences in March and April.

F. Item #6: The Expected Final Completion And Full Operation Date Of The Ohio Canal Tunnel.

The last official schedule update, which was provided to the United States and Ohio shows a delay in meeting AFO until October 27, 2019. This schedule update covers the timeframe through February 27, 2019. The next schedule update, through the end of March, is currently going through the formal review process under the contract and is expected to be available later this week. As discussed above, the TBM was delivered to the construction site nine months late. Since that time, the Contractor reported that additional delays occurred during the mining process. Subsequently, the Contractor informed Akron that the construction of the tunnel diversion structure (“TDS”) will take significantly longer than expected. The TDS is at the downstream end of the tunnel and is a necessary component for the operation of the tunnel. Even more recently, the Contractor has unofficially informed Akron that the AFO date will be delayed into 2020. Akron has not received an official notification regarding this additional delay but will thoroughly evaluate any such notification upon receipt, and will report the information to both U.S. EPA and Ohio EPA.

G. Item #7: Whether The United States Or State Of Ohio Have Calculated And/Or Imposed The Stipulated Penalties Contained In The Decree.

Akron has not received a demand for stipulated penalties from the United States or Ohio. On February 20, 2018, the United States provided Akron with a letter advising Akron that the United States did not approve of a delay in the AFO deadline, and that it would evaluate its enforcement options. Akron has proposed significant mitigation that should offset even a lengthy delay to the AFO deadline.

H. Item #8: Whether There Has Been Any Other Non-Compliance, Regardless Of Whether It Has Been Excused By The United States EPA Or The Ohio EPA, By The City Of Akron.

Please see Section II, above.

I. Item #9: The Current Status Of The Existing Projects That The Parties Seek To Modify With The Second Amendment, Including Whether Akron Is In Compliance With All Deadlines For Those Projects.

The original and amended projects identified in the pending Second Amendment are discussed, separately, below.

1. The Replacement Of BioACTIFLO With BioCEPT.

The LTCP Update required Akron to install a BioACTIFLO unit at the WPCS. As discussed in Section II, above, the approved sizing of the BioACTIFLO unit was set at 60 MGD under the procedures in Exhibit 2 to the LTCP Update. Pursuant to the First Amendment to Consent Decree, the bid date for the BioACTIFLO unit was February 28, 2019, and the AFO date is December 31, 2021.

The Consent Decree required Akron to undertake an additional evaluation of the WPCS control measures and submit a report to U.S. EPA and Ohio EPA no later than October 15, 2016. Specifically, Section V of Attachment A to the Consent Decree required Akron to submit “a report identifying the results of an analysis, based upon information developed subsequent to November 30, 2009, of control measures to eliminate or reduce, to the maximum extent feasible, bypasses of the secondary treatment system.” This Consent Decree requirement and deadline is also identified in Table 1 on page 18 of the Consent Decree. Akron complied with this requirement and submitted its Report on Revising WPCS Control Measures to U.S. EPA and Ohio EPA on October 14, 2016. This technical report included a detailed evaluation of several different types of control technologies for addressing the remaining secondary treatment bypasses at the WPCS and included a recommendation to replace the BioACTIFLO facility with a chemically enhanced primary treatment (“CEPT”) facility. The report concluded that the CEPT facility is capable of meeting the same LTCP Update performance criteria applicable to BioACTIFLO facility. Subsequent to the submission of the Report on Revising WPCS Control

Measures, Akron, U.S. EPA, and Ohio EPA engaged in numerous technical discussions regarding Akron's recommendation for the WPCS. As a result of these discussions, Akron agreed to revise the recommended control measure by adding a biological component to the CEPT facility ("BioCEPT"), as well as to perform full-scale studies. On October 13, 2017, Akron submitted a revised report identifying the BioCEPT facility as the revised WPCS control measure. The recommendation for BioCEPT as the revised control measure has been accepted by U.S. EPA and Ohio EPA.

Attachment A, Section V of the Consent Decree provides as follows:

If the U.S. EPA and OEPA approve the Proposed Revised Control Measure(s) (the Approved Revised Control Measure(s)), those measure(s) shall replace the WPCS control measure(s) in the Final LTCP Update. If that occurs, Akron shall construct the Approved Revised Control Measures(s) in accordance with the description, design and performance criteria, and dates for Bidding of Control Measures and Achievement of Full Operation of the Approved Revised Control Measure(s) identified in the Report under Section V.A., above.

Within the Motion to Enter the Second Amendment, the United States included the change in technology from BioACTIFLO to BioCEPT. Akron submitted Declarations in support of the Motion and additional Declarations in response to the Court's questions. However, under the terms of the Consent Decree, as identified above, Akron is required to construct the BioCEPT facility instead of the BioACTIFLO facility. Akron's Report on Revising WPCS Control Measures did not recommend a change to the bid date or the AFO date. As set forth in Exhibit I to this Status Report, Akron bid the BioCEPT project on January 26, 2019, and, thus, met the February 28, 2019 deadline. The project is scheduled to be in operation by the AFO deadline of December 31, 2021.

2. *The Replacement Of The Rack 26/28 Storage Basin With Green Infrastructure And Other Controls.*

The control measure for Rack 26/28 listed in Row 8 of the LTCP Update is an approximately 1.3-million-gallon storage basin. It has a bid deadline of October 31, 2021, and an AFO deadline of December 31, 2022.

Exhibit 3 provides that “Akron may submit a Green Infrastructure Proposal (“Proposal”) for approval to EPA and the Ohio EPA to reduce the effective storage volume or requirement in Rows 1-12 (excluding Row 11.a) of the LTCP Update.” Exhibit 3 allows Akron to propose additional control measures in combination with the green infrastructure controls. “The Proposal shall identify control measures which use Green Infrastructure, in combination with other control measures, to meet the Performance Criteria and Critical Milestones set forth in Rows 1-12 (excluding Row 11.a.) of the LTCP Update.” Akron proposed green infrastructure measures in combination with other control measures, including upsizing the underflow drain at Racks 26 and 28. Exhibit 3 provides that “[i]f the Proposal is approved by EPA and Ohio EPA, Akron shall either (a) construct and implement the Green Infrastructure control measures in accordance with the provisions and schedule in the approved Proposal and this Exhibit, or (b) construct and implement the original infrastructure control measure in accordance with the design criteria and schedules set forth in Rows 1-12” Notably, Section G of Exhibit 3 to the LTCP Update provides that U.S. EPA’s and Ohio EPA’s approval of Akron’s request shall not be considered a material change.

The United States did include this project within the United States’ Motion to Enter. However, under the terms of the Consent Decree, when the United State and Ohio accepted Akron’s proposal for green measures, Akron was authorized to construction the projects in the

proposal. While the bid and AFO deadlines are a few years away, Akron has bid and constructed the green infrastructure components of its proposal for the Rack 26/28 controls.

3. The Replacement Of The Rack 3 Storage Basin With Green Infrastructure And Other Controls.

The control measure for Rack 3 listed in Row 1 of the LTCP Update is an approximately 1.9-million-gallon storage basin. It had a bid deadline of June 30, 2018, and an AFO deadline of November 30, 2020.

Akron submitted a proposal involving green infrastructure and other control measures, which had at least the same effective storage volume as the Rack 3 basin. U.S. EPA and Ohio EPA have accepted Akron's proposal. Consistent with the requirements of Exhibit 3 of the LTCP Update (as discussed above) Akron is authorized to construct the control measures in its proposal. As set forth in Exhibit I to this Status Report, Akron met the bid deadline for the projects in the approved proposal. Akron is constructing the improvements and is on schedule to meet the AFO deadline.

4. The Replacement Of the Rack 27/29 Storage Basin With Optimized Conveyance.

The control measure for Rack 27/29 listed in Row 9 of the LTCP Update is an approximately 1.3-million-gallon storage basin. It had a bid deadline of January 31, 2018, and an AFO deadline of December 31, 2019.

Akron developed control measures involving increased conveyance to replace this storage basin. Akron worked with U.S. EPA and Ohio EPA, providing detailed technical analysis demonstrating that the increased conveyance will meet the same performance criteria as the storage basin. These regulatory agencies concurred with Akron's proposal. To address questions raised by the Court, Akron retained an additional expert that confirmed that the

replacement projects would meet the same performance criteria as the original basin. Finally, elimination of the original storage basin will also reduce impacts to the Towpath Trail.

As a result of the foregoing, and in acting in good faith to meet the deadlines within the Consent Decree, Akron bid the increase conveyance projects on January 16, 2018. These projects are under construction and Akron intends to meet the AFO deadline. Akron has not bid and is not intending to construct the storage basin. However, by constructing the increased conveyance projects, Akron will have met the goals of the Consent Decree.

5. *The Rack 10/11 Storage Basin.*

The control measure for Rack 10/11 listed in Row 3 of the LTCP Update is an approximately 2.5-million-gallon storage basin. It had a bid deadline of June 30, 2018, and an AFO deadline of December 31, 2020.

Akron bid the Rack 10/11 storage basin on June 28, 2018, which is before the deadline. The bid was for a larger basin which will be approximately 4.5 million gallons. The project is on schedule to meet the AFO deadline.

IV. CONCLUSION

The CSO Program is a monumental program that is unprecedented in scope, cost, and financial burden. This is the largest infrastructure program in Akron's history. Akron is committed to and will continue to work collaboratively with the United States and Ohio as it works toward completion of the CSO Program.

Respectfully submitted,

/s/ Terrence S. Finn

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PROOF OF SERVICE

I hereby certify that on April 29, 2019, a copy of *Defendant City of Akron's Status Report* was filed electronically. Notice of this filing will be sent to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

/s/ Terrence S. Finn

Terrence S. Finn

| CD Paragraph / Long Term Control Plan (LTCP) Row | | | | | Alternative Project | | | Bidding of Control Measure | | Actual Bid Date | | In-Service Date | Achievement of Full Operation | Actual AFO Date | Projected Project Cost (No Construction Escalation) | | Project Status |
|--|--|--|--|--|---|---|--|---------------------------------------|---|-----------------|--|---------------------------------------|-------------------------------|-----------------|---|--------------|----------------|
| CD Project | Description | Design Criteria | Performance Criteria | Description | Alternative Project Design Criteria | Alternative Project Performance Criteria | | | | | | | | | | | |
| CD Para 11 | CSO Rack 8 | Sewer Separation | Sewer Separation | CSO eliminated | | | | na | na | | 12/14/2012 | 11/13/2013 | 12/14/2012 | ✓ | \$ 2,931,859 | Complete | |
| CD Para 11 | CSO Rack 25 | Sewer Separation | Sewer Separation | CSO eliminated | | | | na | na | | 12/24/2012 | 11/13/2013 | 12/24/2012 | ✓ | \$ 1,595,270 | Complete | |
| CD Para 11 | CSO Rack 13 | Sewer Separation | Sewer Separation | CSO eliminated | | | | na | na | | 6/14/2016 | 11/13/2017 | 10/14/2016 | ✓ | \$ 3,402,102 | Complete | |
| CD Para 11 | CSO Rack 21 | Sewer Separation | Sewer Separation | CSO eliminated | | | | na | na | | 7/18/2017 | 11/13/2017 | 11/9/2017 | ✓ | \$ 8,785,541 | Complete | |
| CD Para 11 | CSO Rack 30 | Sewer Separation | Sewer Separation | CSO eliminated | | | | na | na | | 10/31/2017 | 11/13/2017 | 11/9/2017 | ✓ | \$ 2,202,253 | Complete | |
| Row 1 | CSO Rack 3 | Storage Basin | 1,865,006 gallons | 0 CSOs in Typical Year | LTCP Exhibit 3 and Proposed CD Amendment No. 2, Kelly Optimized | Green Infrastructure with Additional Conveyance | 0 CSOs in Typical Year | 6/30/2018 | 6/23/2018 | ✓ | | 11/30/2020 | | | \$ 9,616,220 | Construction | |
| | | | | | Proposed CD Amendment No. 2, Row 1a | Green O&M Plan | na | na | na | | na | 8/30/2020 | | | | | |
| Row 2 | CSO Racks 5 and 7 | Storage Basin | 1,105,920 gallons | 0 CSOs in Typical Year | LTCP Update Exhibit 3 Middlebury Green/Separation | Green Infrastructure with Sewer Separation | CSO Eliminated | 10/31/2015 | 10/31/2015 | ✓ | 10/13/2017 | 10/31/2017 | 10/26/2017 | ✓ | \$ 23,894,516 | Complete | |
| Row 3 | CSO Racks 10 and 11 | Storage Basin | 2,518,616 gallons | 0 CSOs in Typical Year | Proposed CD Amendment No. 2, Hazel Storage Basin | 4,500,000 gallons | 0 CSOs in Typical Year | 6/30/2018 | 6/28/2018 | ✓ | | 12/31/2020 | | | \$ 35,210,381 | Construction | |
| Row 4 | CSO Rack 12 | Storage Basin | 6,004,454 gallons | 0 CSOs in Typical Year | | 6,500,000 gallons | 0 CSOs in Typical Year | 11/30/2014 | 11/5/2014 | ✓ | 8/25/2017 | 10/31/2017 | 10/30/2017 | ✓ | \$ 32,203,166 | Complete | |
| Row 5 | CSO Rack 14 | Storage Basin | 1,927,842 gallons | 0 CSOs in Typical Year | | 2,100,000 gallons | 0 CSOs in Typical Year | 10/31/2014 | 10/20/2014 | ✓ | 12/22/2016 | 4/30/2017 | 1/3/2017 | ✓ | \$ 19,319,167 | Complete | |
| Row 6 | CSO Rack 15 | Storage Basin | 1,446,246 gallons | 0 CSOs in Typical Year | | | | 11/30/2013 | 4/5/2014 | a | 10/30/2015 | 10/31/2015 | 2/17/2016 | a | \$ 11,100,316 | Complete | |
| Row 7 | CSO Rack 22 | Storage Basin | 2,424,446 gallons | 0 CSOs in Typical Year | | | | 10/31/2015 | 10/7/2015 | ✓ | 10/5/2017 | 12/31/2017 | 11/29/2017 | ✓ | \$ 22,296,997 | Complete | |
| Row 8 | CSO Racks 26 and 28 | Storage Basin | 2,296,669 gallons | 0 CSOs in Typical Year | LTCP Exhibit 3 and Proposed CD Amendment No. 2, Aqueduct/Memorial Green/Additional Conveyance | Green Infrastructure with Additional Conveyance | 0 CSOs in Typical Year | 10/31/2021 | Aqueduct portion of project bid 2/25/17 with street project | | Aqueduct portion of project completed 12/17/18 | 12/31/2022 | | | \$ 4,957,631 | Construction | |
| | | | | | Proposed CD Amendment No. 2, Row 8a | Green O&M Plan | na | na | na | | na | 3/11/2019 | 4/24/2019 | d | | Complete | |
| Row 9 | CSO Racks 27 and 29 | Storage Basin | 1,290,276 gallons | 0 CSOs in Typical Year | Proposed CD Amendment No. 2, Uhler Additional Conveyance | Additional Conveyance | 0 CSOs in Typical Year | 1/31/2018 | 1/16/2018 | ✓ | | 12/31/2019 | | | \$ 8,746,239 | Construction | |
| Row 10 | CSO Rack 36 | Storage Basin | 1,133,074 gallons | 0 CSOs in Typical Year | LTCP Update Exhibit 3 Merriman Green/Separation | Green Infrastructure with Sewer Separation | CSO Eliminated | 10/31/2015 | 9/25/2015 | ✓ | 8/16/2017 | 10/31/2017 | 10/30/2017 | ✓ | \$ 17,231,025 | Complete | |
| Row 11 | CSO Racks 4, 16,17, 18, 19, 20, 23, 24, 37 | Ohio Canal Tunnel | 28-ft internal diameter, 5,550 ft in length, 25,600,000 gallons | No more than 7 CSOs in Typical Year, Racks 4 and 37 0 CSOs in Typical Year | | 27-ft internal diameter, 6,240 ft in length, 25,600,000 gallons | No more than 7 CSOs in Typical Year, Racks 4 and 37 0 CSOs in Typical Year | 4/30/2014 | 11/30/2013 | ✓ | | 12/31/2018 | see note | b | \$ 303,227,962 | Construction | |
| Row 11a | CSO Racks 16, 17, 18, 19, 20, 23, 24 | Ohio Canal Tunnel ACTIFLO | Design capacity 300 million gallons per day | 30 mg/l TSS, E. coli limits, residual chlorine limit | | | | 4/30/2024 | | | | 10/31/2027 | | | \$ 65,915,410 | Planning | |
| Row 12 | CSO Racks 32, 33, 34, 35 | Northside Interceptor Tunnel | 20-ft internal diameter, 10,000 feet in length, 23,000,000 gallons | 0 CSOs in Typical Year | | | | 4/30/2023 | | | | 12/31/2026 | | | \$ 301,409,545 | Planning | |
| Row 13a | WPCS Phase 1 | Upgrade conventional secondary treatment by step feed process in Train 6 | Secondary treatment process to 130 MGD | No more than 22 bypasses | | | | 10/31/2011 | 8/2/2011 | ✓ | 7/1/2013 | 10/15/2013 | 9/20/2013 | ✓ | \$ 16,046,112 | Complete | |
| Row 13b | na | | | | | | | | | | | | | | | | |
| Row 14 | WPCS Phase 1 BioACTIFLO Pilot | Conduct Pilot Study | | | | | | na | na | | na | 12/31/2013 | 2/28/2013 | ✓ | \$ 2,505,310 | Complete | |
| Row 15 | WPCS Phase 2-Part 1 | na | | | | | | | | | | | | | | | |
| Row 16 | WPCS Phase 2-Part 2 | na | | | | | | | | | | | | | | | |
| Row 17 | Alternative Plan A - Phase 2 - Part 1 | WPCS - Upgrade conventional secondary treatment capacity | WPCS - Upgrade conventional secondary treatment capacity | WPCS - Upgrade conventional secondary treatment capacity | | Exhibit 2 of LTCP 220 MGD, Approved 2/11/2016 | | Revised per Amendment No. 1 4/30/2017 | 4/13/2016 | ✓ | 7/1/2013 greater than 130MGD | Revised per Amendment No. 1 4/30/2019 | | | \$ 43,320,301 | Construction | |

